



Charity FAQs: Incorporation

What is incorporation?

Incorporation is the process whereby a company is created and, if carrying on the work of an existing unincorporated charity, the transferring of the assets, liabilities and operations of the existing charity into the new company. Trustees also become directors under company law.

What are the main advantages of incorporation?

- A company is a separate legal entity, quite separate from its members and directors.
- A company can own land in its own right, rather than doing so in the names of the individual trustees. As trustees resign and new ones are appointed there is no need to re-register title.
- A company can enter into contracts in its own right, rather than individual trustees.
- A company confers limited liability on the members. They will have no liability to the company beyond the value of their share or guarantee.
- Directors are agents of the company and are not liable for the debts of the company in the ordinary course of business.

Does limited liability protect directors in all circumstances?

No. Directors of a company may be liable to make payments to the company if:
they act in breach of trust or duty to the company
they are responsible for fraudulent or wrongful trading.

The directors of the company are also the trustees of the charity under charity law and are still personally liable for actions that are in breach of their duties as trustees.

When should trustees consider incorporation?

- When the charity is quite large and the day-to-day management is devolved to paid or unpaid staff.
- When the charity has employees.
- When the charity is delivering services under contractual agreements.
- When the charity enters into other commercial contracts.
- When the charity owns property or enters into long-term leases.

Trustees have a duty to make decisions in the best interest of the charity, not the best interests of the trustees, and so must weigh-up the cost/benefits of incorporation to the charity.

When is incorporation unnecessary?

If none of the above apply, incorporation is probably unnecessary. Risks can be mitigated in other ways, for example by limiting liability within contracts or taking out insurance. Practical issues of ownership of land can be overcome, for example by vesting title with the Charity Commission as custodian trustees.



How does the incorporation process work?

Once the decision to incorporate has been made, two parallel processes take place:

1. The existing unincorporated charity has to be dissolved

This has to be done in accordance with the dissolution clause in the constitution, or if there is no such clause, in accordance with Charity Commission guidance. The trustees may not be able to dissolve the charity, for example if the charity has permanent endowment.

The process usually involves the agreement of the members, if separate from the trustees, at the AGM or specially convened meeting. Once the dissolution is agreed, the assets can be passed over or transferred into the name of the new charity.

The trustees have a duty to inform the Charity Commission that the charity no longer exists and provide certain information to the Charity Commission. The Charity Commission will then remove the charity from the register.

2. The new charity has to be created and registered

At present the only option charities have is to form a **company, limited by guarantee** and register with Companies House. The trustees have to agree and adopt a Memorandum and Articles of Association (M&A) which sets out, amongst other things, the objects of the company, the powers of the directors, the structure of the company and how it will operate internally.

In order to be charitable, the company must be limited by guarantee and have:

- charitable objects
- a dissolution clause that transfers the assets to another similar charity and
- allows no private benefits for members or trustees
- disallows alteration to key clauses in the M&A.

When the company is registered, it receives a certificate of incorporation and a company number.

The M&A and Certificate of Incorporation are submitted to the Charity Commission with an application form and other supporting paperwork. The Charity Commission will consider any significant differences between the new and old constitutions so it is important to get specialist legal advice throughout the process as it can be costly and time-consuming to change the M&A once registered with Companies House.

Once registered with the Charity Commission, the assets and liabilities of the unincorporated charity can be transferred.

Charitable companies must comply with company and charity law, are regulated by both Companies House and the Charity Commission, and must submit accounts and returns to both.



The *Charitable Incorporated Organisation (CIO)* is a new legal form that will be available only to charities. It will have the benefits of a single registration process, as charitable status and limited liability will both be conferred on registration. The Charity Commission will be the sole regulator in England and Wales.

Introduced in the Charities Act 2006, consultation on the detailed legal framework and model constitutions closed in December 2008. It is not yet known when registrations will start.

Should we wait to register as a CIO?

Companies limited by guarantee will be able to convert to CIOs so if incorporation is in the best interests of the charity, trustees should not delay the process. The legal personality will not be interrupted by the conversion. There is no new legal entity – the corporate body simply becomes registered under different legislation and a different constitution. Timing is likely to be important as accounts will have to be made up to the date of conversion under company law and from conversion under charity law.

Where can I get additional help and guidance?

The Charity Commission has produced the following relevant publications and guidance notes which can be downloaded from its website: www.charitycommission.gov.uk

- CC22: *Choosing and Preparing a Governing Document*
CSD 1344A: *Guidance on Dissolving a Small Charity*
CSD 1077A: *Dissolution, Winding up and Removal from the Register for Medium-sized Charities*

This briefing note is intended for guidance only.

No decisions or actions should be taken without seeking professional advice specific to your charity.

Myers Clark provides a wide range of advice and support services to charities.
Please do not hesitate to contact us if you need assistance.